

WHAT IS A PREDECESSOR COMPANY FOR PAST PERFORMANCE PURPOSES?

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The Government Accountability Office (“GAO”) recently ruled that in negotiated procurement, a company cannot attribute to itself the past performance of asserted “predecessor” companies where those companies are separate and distinct companies from the offeror. *Choctaw Staffing Sol.*, B-413434, Oct. 24, 2016. The GAO held that Choctaw’s assertion that two other companies were its predecessors was inconsistent with usage of that term in the Federal Acquisition Regulation (“FAR”).

Choctaw submitted a proposal to support the Domestic Abuse Victim Advocate Program at various Air Force Military Treatment Facilities. The Request for Proposals (“RFP”) stated that in the evaluation, the Government would “take into account past performance information regarding predecessor companies and key personnel who have relevant experience.” Choctaw protested that the agency failed to properly attribute the past performance of two predecessor companies to its past performance. Specifically, Choctaw’s proposal identified two contractors as Choctaw’s predecessor companies, and asserted that they should be considered “as past performance for [Choctaw] in accordance with FAR 15.305(a)(2)(iii).” FAR 15.305(a)(2)(iii) states “[t]he evaluation [of past performance] should take into account past performance information regarding predecessor companies, key personnel...when such information is relevant to the instant acquisition.” .

The RFP did not define the term “predecessor companies,” nor does the FAR define either “predecessor companies” or the term “predecessor.”

The GAO determined that the two asserted predecessors had not been acquired by, or merged with Choctaw, nor had they been reorganized into Choctaw. The GAO concluded that they “remain[ed] separate and distinct entities from” Choctaw. Having determined that the two entities were separate from Choctaw, the GAO denied the protest, holding that the agency had properly *not* imputed the performance of these two companies to Choctaw in their evaluation of proposals.

The GAO based its holding that the two companies were not “predecessors” on FAR 52.204-20, Predecessor of Offeror, a clause not included in the RFP. (However, FAR 52.204-20 is referenced in FAR 9.104-6, which discusses predecessors in the contest of responsibility determinations.) FAR 52.204-20(a) defines “predecessor” as an entity that is replaced by a successor and includes any predecessors of the predecessor.” The companies that Choctaw asserted as predecessor companies did not meet the definition in the FAR, and could not be counted as predecessors.

Readers should also be aware that FAR 52.212-3 (Jan 19, 2017 version) includes a definition of “predecessor” that is the same as in FAR 52.204-20, namely “an entity that is replaced by a successor and includes any predecessors of the predecessor.” This was added to the FAR subsequent to the *Choctaw* protest, but is fully consistent with that decision by GAO.

